

Craig M. Murphy, Esq.
 California Bar No. 314526
craig@nvpilaw.com
 MURPHY & MURPHY LAW OFFICES
 4482 Market Street, Ste 407
 Ventura, CA 93003
 (805) 330-3393 Phone
 (702) 369-9630 Fax
 Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SHANNON KLINGELHOFFER and STEPHEN AVIGIAN, husband and wife, individually and as the parents of A.K., a minor; <p style="text-align: center;">Plaintiffs,</p> vs. TARGET CORPORATION, a foreign corporation d/b/a TARGET; KEHE DISTRIBUTORS, LLC, a foreign limited-liability company; KEHE DISTRIBUTORS, INC., a foreign corporation; KEHE ENTERPRISES, LLC, a foreign limited-liability company; WORLD FINER FOODS, INC., a foreign corporation; and WORLD FINER FOODS, LLC, a foreign limited-liability company; DOES 1-10, inclusive; and ROE ENTITIES 1-10, inclusive, <p style="text-align: center;">Defendants.</p>	Case No.: Dept. No.: <p style="text-align: center;"><u>COMPLAINT</u></p> <p style="text-align: center;">DEMAND FOR JURY TRIAL</p>
---	---

COME NOW the Plaintiffs, Shannon Klingelhoffer and Stephen Avigian, husband and wife, individually and as parents of A.K., a minor, by and through their attorney of record, Craig Murphy, Esq. of Murphy & Murphy Law Offices, and allege and state as follows:

PARTIES

1. At all times relevant to this action, the Plaintiffs resided in San Francisco County, California. The Plaintiffs are therefore citizens of the State of California.

Murphy & Murphy Law Offices
4482 Market Street, Ste 407
Ventura, California 93003
Telephone (805) 330-3393
Facsimile (702) 369-9630

1 2. At all times relevant to this action, Defendant Target
2 Corporation was a Minnesota corporation with its principal place of
3 business located in Minneapolis, Minnesota. Target is therefore a
4 citizen of the State of Minnesota. At all times relevant to this
5 action, Target owned and operated the Target retail store located at
6 401 Kenilworth Drive, Petaluma, California.

7 3. At all times relevant to this action, Defendant KeHE
8 Distributors, LLC, was a Delaware limited-liability company with its
9 principal place of business in Naperville, Illinois. On information and
10 belief, KeHE's only member is Brandon Barnholt, who resides in
11 Naperville, Illinois. Therefore, KeHE Distributors, LLC is a citizen
12 of the States of Illinois and Delaware.

13 4. At all times relevant to this action, Defendant KeHE
14 Distributors, Inc., was a Delaware corporation with its principal place
15 of business in Naperville, Illinois. Therefore, KeHE Distributors, Inc.
16 is a citizen of the States of Delaware and Illinois.

17 5. At all times relevant to this action, Defendant KeHE Enterprises,
18 LLC, was a Delaware corporation with its principal place of business in
19 Naperville, Illinois. Therefore, KeHE Enterprises, LLC is a citizen of
20 the States of Delaware and Illinois.

21 6. At all times relevant to this action, Defendant World Finer
22 Foods, Inc. was a Delaware corporation with its principal place of
23 business located in Bloomfield, New Jersey. World Finer Foods, Inc. is
24 therefore a citizen of the States of Delaware and New Jersey.

25 7. At all times relevant to this action, Defendant World Finer
26 Foods, LLC was a Delaware corporation with its principal place of
27 business in Bloomfield, New Jersey. World Finer Foods, LLC is therefore
28 a citizen of the States of Delaware and New Jersey.

1 8. DOES 1 through 10 inclusive are persons, and ROE ENTITIES 1
2 through 10 are corporations, related subsidiary or parent entities,
3 associations, or business entities, whose true names and identities and
4 capacities are unknown to Plaintiffs at this time. The DOE Defendants
5 are individual persons acting on behalf of or in concert with, or at
6 the direction of, any of the Defendants. The ROE Defendants may be
7 corporations, associations, partnerships, subsidiaries, holding
8 companies, owners, predecessor or successor entities, joint ventures,
9 parent corporations, related business entities or the employer of any
10 of the Defendants. Each named Defendant and the DOE and ROE Defendants
11 are legally responsible for the events and happenings stated in this
12 Complaint, and thus proximately caused injury and damages to
13 Plaintiffs. In particular, said DOE and ROE Defendants are responsible
14 in full or in part for the manufacture, distribution, processing,
15 preparation, contamination, and sale of the ingredients in and the I.
16 M. Healthy brand SoyNut Butter sold to or by Defendants herein.
17 Plaintiff will ask leave of this Court to insert the true names and
18 capacities for such DOE and ROE Defendants when discovered to
19 substitute those true names as defendants into these proceedings for
20 said DOE and ROE Defendants.

21 **JURISDICTION AND VENUE**

22 9. This Court has jurisdiction over the subject matter of this
23 action pursuant to 28 U.S.C. § 1332(a) because the matter in
24 controversy exceeds \$75,000.00, exclusive of costs, it is between
25 citizens of different states, and because the Defendants have certain
26 minimum contacts with the State of California such that maintenance of
27 the suit in this district does not offend traditional notions of fair
28 play and substantial justice.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

The Outbreak

9
10
11
12
13

14
15
16
17
18
19
20
21
22
23

24

25

26

27

28

1 Healthy brand soy nut butter products as the source of the outbreak,
2 the Food and Drug Administration (FDA) conducted a comprehensive
3 investigation at the Dixie Dew facility. Among other things, the FDA
4 found:

- 5 a. grossly insanitary conditions;
- 6 b. food contact surfaces, floors, walls, and ceilings in the
7 soy nut butter processing and packaging rooms were heavily
8 coated with soy nut butter build-up from previous
9 production runs;
- 10 c. that Dixie Dew does not routinely wash and sanitize smaller
11 pipes, pipe fittings, gaskets, seals, "or the rubber _____
12 plug" when broken down following a production run;
- 13 d. that Dixie Dew does not conduct a kill step for SoyNut
14 Butter product remaining in its mixing kettle leftover from
15 a production run;
- 16 e. that certain equipment in the facility routinely shuts off
17 during processing—approximately one to two times per day—
18 and that the problem has persisted for approximately 15
19 years despite repeated maintenance intended to correct the
20 problem;
- 21 f. that a thermometer used during the production of the
22 subject product has never been verified for accuracy;
- 23 g. that a temperature probe and chart recorder used during the
24 production process for the subject product does not
25 function properly and has not been used for well over a
26 year;
- 27 h. that Dixie Dew's food safety testing program is
28 problematic—among other things, due to the failure to

Murphy & Murphy Law Offices
4482 Market Street, Ste 407
Ventura, California 93003
Telephone (805) 330-3393
Facsimile (702) 369-9630

perform microbial testing where necessary to identify possible food contamination;

i. that FDA inspectors found that testing materials on hand at Dixie Dew had expired in July 2016 and October 2015.

j. that Dixie Dew had a fly infestation problem, and that small apparent flies and fly larvae, too numerous to count, were inside an unplugged chest freezer;

14. On March 4, 2017, as a result of epidemiologic and environmental evidence indicating that its soy nut butter products were the source of the outbreak, The SoyNut Butter Company recalled I.M. Healthy Original Creamy Soy Nut Butter with "best by" dates July 5, August 30, and August 31, 2018. This recall also included individual portion cups of the same product with best by dates in July, August, and November 2018.

15. On March 7, 2017, The SoyNut Butter Company expanded its recall to include all varieties of I.M. Healthy soy nut butters and all varieties of I.M. Healthy granola products, regardless of production or best by date.

16. Plaintiff was one of multiple individuals to make a claim for personal injuries against The SoyNut Butter Company and Dixie Dew as a result of this outbreak. Both companies filed for Chapter 7 bankruptcy, and the assets of these companies available to satisfy personal injury claims arising from this outbreak, including Plaintiffs', were insufficient to fairly compensate the claimants.

17. At all times relevant to this action, Defendants KeHE Distributors, LLC, KeHE Distributors, Inc., and KeHE Enterprises, LLC were all alter egos of one another and are referred to collectively as "Defendant Kehe" in this complaint. These entities jointly or independently distributed I.M. Healthy SoyNut Butter. On information

1 and belief, Brandon Barnholt is a primary member and/or officer of all
2 of these entities. There thus exists a unity of interest and ownership
3 between these related entities, the exact relationship of which is not
4 fully known by Plaintiffs, and all are liable in this action.

5 18. At all times relevant to this action, Defendants World Finer
6 Foods, Inc. and World Finer Foods, LLC were alter egos of one another
7 and are referred to collectively as "Defendant World Finer" in this
8 complaint. These entities jointly or independently distributed I.M.
9 Healthy SoyNut Butter. On information and belief, Brandon Barnholt is a
10 primary member and/or office of all of these entities. There thus
11 exists a unity of interest and ownership between these related
12 entities, the exact relationship of which is not fully known by
13 Plaintiffs, and both are liable in this action.

14 19. Defendants Kehe and World Finer are distributors of various food
15 products to retail stores and foodservice locations nationally.
16 Defendants Kehe and World Finer each acquired and distributed recalled
17 soy nut butter products, including to Target and other retail stores
18 nationally.

19 20. With regard to the contaminated jar of I.M. Healthy Soy Nut
20 Butter that Plaintiffs purchased at Target, as described below, World
21 Finer acquired this product from The SoyNut Butter Company and
22 distributed it to Kehe. Kehe then distributed the product to the
23 Target store location where Plaintiffs purchased it.

24 **E. coli O157:H7**

25 21. *E. coli* is an archetypal commensal bacterial species that lives
26 in mammalian intestines. *E. coli* O157:H7 is one of thousands of
27 serotypes *Escherichia coli*. The combination of letters and numbers in
28 the name of the *E. coli* O157:H7 refers to the specific antigens

Murphy & Murphy Law Offices
4482 Market Street, Ste 407
Ventura, California 93003
Telephone (805) 330-3393
Facsimile (702) 369-9630

(proteins which provoke an antibody response) found on the body and tail or flagellum respectively and distinguish it from other types of *E. coli*. Most serotypes of *E. coli* are harmless and live as normal flora in the intestines of healthy humans and animals. The *E. coli* bacterium is among the most extensively studied microorganism. The testing done to distinguish *E. coli* O157:H7 from its other *E. coli* counterparts is called serotyping. Pulsed-field gel electrophoresis (PFGE), sometimes also referred to as genetic fingerprinting, is used to compare *E. coli* O157:H7 isolates to determine if the strains are distinguishable. A technique called multilocus variable-number tandem repeat analysis (MLVA) is used to determine precise classification when it is difficult to differentiate between isolates with indistinguishable or very similar PFGE patterns.

22. *E. coli* O157:H7 was first recognized as a pathogen in 1982 during an investigation into an outbreak of hemorrhagic colitis associated with consumption of hamburgers from a fast food chain restaurant. Retrospective examination of more than three thousand *E. coli* cultures obtained between 1973 and 1982 found only one (1) isolation with serotype O157:H7, and that was a case in 1975. In the ten (10) years that followed there were approximately thirty (30) outbreaks recorded in the United States. This number is likely misleading, however, because *E. coli* O157:H7 infections did not become a reportable disease in any state until 1987 when Washington became the first state to mandate its reporting to public health authorities. As a result, only the most geographically concentrated outbreak would have garnered enough notice to prompt further investigation.
23. *E. coli* O157:H7's ability to induce injury in humans is a result of its ability to produce numerous virulence factors, most notably

Murphy & Murphy Law Offices
4482 Market Street, Ste 407
Ventura, California 93003
Telephone (805) 330-3393
Facsimile (702) 369-9630

1 Shiga-like toxins. Shiga toxin (Stx) has multiple variants (e.g. Stx1,
2 Stx2, Stx2c), and acts like the plant toxin ricin by inhibiting protein
3 synthesis in endothelial and other cells. Shiga toxin is one of the
4 most potent toxins known. In addition to Shiga toxins, *E. coli* O157:H7
5 produces numerous other putative virulence factors including proteins,
6 which aid in the attachment and colonization of the bacteria in the
7 intestinal wall and which can lyse red blood cells and liberate iron to
8 help support *E. coli* metabolism.

9 24. *E. coli* O157:H7 evolved from enteropathogenic *E. coli* serotype
10 O55:H7, a cause of non-bloody diarrhea, through the sequential
11 acquisition of phage-encoded Stx2, a large virulence plasmid, and
12 additional chromosomal mutations. The rate of genetic mutation of *E.*
13 *coli* O157:H7 indicates that the common ancestor of current *E. coli*
14 O157:H7 clades likely existed some 20,000 years ago. *E. coli* O157:H7 is
15 a relentlessly evolving organism, constantly mutating and acquiring new
16 characteristics, including virulence factors that make the emergence of
17 more dangerous variants a constant threat. The CDC has emphasized the
18 prospect of emerging pathogens as a significant public health threat
19 for some time.

20 25. Although foods of a bovine origin are the most common cause of
21 both outbreaks and sporadic cases of *E. coli* O157:H7 infections,
22 outbreak of illnesses have been linked to a wide variety of food items.
23 For example, produce has, since at least 1991, been the source of
24 substantial numbers of outbreak-related *E. coli* O157:H7 infections.
25 Other unusual vehicles for *E. coli* O157:H7 outbreaks have included
26 unpasteurized juices, yogurt, dried salami, mayonnaise, raw milk, game
27 meats, sprouts, and raw cookie dough.

28 26. According to a recent study, an estimated 93,094 illnesses are

Murphy & Murphy Law Offices
4482 Market Street, Ste 407
Ventura, California 93003
Telephone (805) 330-3393
Facsimile (702) 369-9630

1 due to domestically acquired *E. coli* O157:H7 each year in the United
2 States. Estimates of foodborne acquired O157:H7 cases result in 2,138
3 hospitalizations and 20 deaths annually. The colitis caused by *E. coli*
4 O157:H7 is characterized by severe abdominal cramps, diarrhea that
5 typically turns bloody within twenty-four (24) hours, and sometimes
6 fevers. The incubation period—which is to say the time from exposure to
7 the onset of symptoms—in outbreaks is usually reported as three (3) to
8 four (4) days but may be as short as one (1) day or as long as ten (10)
9 days. Infection can occur in people of all ages but is most common in
10 children. The duration of an uncomplicated illness can range from one
11 (1) to twelve (12) days. In reported outbreaks, the rate of death is 0-
12 2%, with rates running as high as 16-35% in outbreaks involving the
13 elderly, like those that have occurred at nursing homes.

14 27. What makes *E. coli* O157:H7 remarkably dangerous is its very low
15 infectious dose, and how relatively difficult it is to kill these
16 bacteria. Unlike *Salmonella*, for example, which usually requires
17 something approximating an "egregious food handling error, *E. coli*
18 O157:H7 in ground beef that is only slightly undercooked can result in
19 infection," as few as twenty (20) organisms may be sufficient to infect
20 a person and, as a result, possibly kill them. And unlike generic *E.*
21 *coli*, the O157:H7 serotype multiplies at temperatures up to 44°F,
22 survives freezing and thawing, is heat resistant, grows at temperatures
23 up to 111°F, resists drying, and can survive exposure to acidic
24 environments.

25 28. And, finally, to make it even more of a threat, *E. coli* O157:H7
26 bacteria are easily transmitted by person-to-person contact. There is
27 also the serious risk of cross-contamination between raw meat and other
28 food items intended to be eaten without cooking. Indeed, a principle

1 and consistent criticism of the USDA *E. coli* O157:H7 policy is the fact
2 that it has failed to focus on the risks of cross-contamination versus
3 that posed by so-called improper cooking. With this pathogen, there is
4 ultimately no margin of error. It is for this precise reason that the
5 USDA has repeatedly rejected calls from the meat industry to hold
6 consumers primarily responsible for *E. coli* O157:H7 infections caused,
7 in part, by mistakes in food handling or cooking.

8 **Hemolytic Uremic Syndrome (HUS)**

9 29. *E. coli* O157:H7 infections can lead to a severe, life-threatening
10 complication called hemolytic uremic syndrome ("HUS"). HUS accounts for
11 the majority of the acute and chronic illness and death caused by the
12 bacteria. HUS occurs in 2-7% of victims, primarily children, with onset
13 five to ten days after diarrhea begins. It is the most common cause of
14 renal failure in children. Approximately half of the children who
15 suffer HUS require dialysis, and at least 5% of those who survive have
16 long-term renal impairment. The same number suffers severe brain
17 damage. While somewhat rare, serious injury to the pancreas, resulting
18 in death or the development of diabetes, can also occur. There is no
19 cure or effective treatment for HUS. And, tragically, as too many
20 parents can attest, children with HUS too often die.

21 30. HUS is believed to develop when the toxin from the bacteria,
22 known as Shiga-like toxin (SLT), enters the circulation through the
23 inflamed bowel wall. SLT, and most likely other chemical mediators,
24 attach to receptors on the inside surface of blood vessel cells
25 (endothelial cells) and initiate a chemical cascade that results in the
26 formation of tiny thrombi (blood clots) within these vessels. Some
27 organs seem more susceptible, perhaps due to the presence of increased
28 numbers of receptors, and include the kidney, pancreas, and brain. By

1 definition, when fully expressed, HUS presents with the triad of
2 hemolytic anemia (destruction of red blood cells), thrombocytopenia
3 (low platelet count), and renal failure (loss of kidney function).

4 31. As already noted, there is no known therapy to halt the
5 progression of HUS. HUS is a frightening complication that, even in the
6 best American centers, has a notable mortality rate. Among survivors,
7 at least five percent will suffer end stage renal disease (ESRD) with
8 the resultant need for dialysis or transplantation. But "[b]ecause
9 renal failure can progress slowly over decades, the eventual incidence
10 of ESRD cannot yet be determined." Other long-term problems include the
11 risk for hypertension, proteinuria (abnormal amounts of protein in the
12 urine that can portend a decline in renal function), and reduced kidney
13 filtration rate. Other long-term problems include the risk for
14 hypertension, proteinuria (abnormal amounts of protein in the urine
15 that can portend a decline in renal function), and reduced kidney
16 filtration rate. Since the longest available follow-up studies of HUS
17 victims are 25 years, an accurate lifetime prognosis is not really
18 available and remains controversial. All that can be said for certain
19 is that HUS causes permanent injury, including loss of kidney function,
20 and it requires a lifetime of close medical monitoring.

21 **A.K.'s *E. coli* O157:H7 Infection**

22 32. The Plaintiffs purchased multiple jars of I.M. Healthy SoyNut
23 Butter that caused the injuries giving rise to this Complaint on
24 January 11 and January 30, 2017, from Target stores located in the area
25 of San Francisco, California. A.K. consumed product from these jars on
26 several occasions in the days leading up to the onset of his illness.
27 At least one of these jars of soy nut butter was contaminated by *E.*
28 *coli* O157:H7, causing A.K.'s severe illness.

36. A.K. was discharged on February 6, 2017. He continued to have follow-up appointments for several weeks afterwards with his pediatrician to monitor his system for continued adverse effects of his *E. coli* infection.

(Strict Products Liability)

39. The Defendants, and each of them, regularly purchased, distributed, and sold I.M. Healthy SoyNut Butter products. The Defendants, and each of them, purchased, distributed, and sold the subject product.

1 40. Food that is contaminated by *E. coli* O157:H7 is unsafe when put
2 to its reasonably foreseeable use considering the nature of the
3 product. Namely, *E. coli* O157:H7 contaminated food is unfit for human
4 consumption.

5 41. The subject product was contaminated by *E. coli* O157:H7 when it
6 left the control of the Defendants. A.K.'s consumption of the
7 contaminated food caused him to become infected by *E. coli* O157:H7 and
8 to suffer injuries as a direct and proximate result of that
9 consumption.

10 42. The Defendants are strictly liable to the Plaintiffs for the harm
11 proximately caused by the distribution and sale of an unsafe and
12 defective food product.

13 **COUNT II**

14 **(Negligence)**

15 43. The Plaintiffs incorporate by reference and makes a part of this
16 Count each and every foregoing paragraph of this Complaint.

17 44. The Defendants had a duty to comply with all statutory and
18 regulatory provisions that pertained or applied to the distribution,
19 storage, labeling, and sale of the food products that injured A.K.,
20 including the applicable provisions of the Federal Food, Drug and
21 Cosmetic Act, and similar California food and public health statutes,
22 including without limitation the provisions of the California Health &
23 Safety Code Article 5, all of which prohibit the sale of any food that
24 is adulterated, or otherwise injurious to health.

25 45. The subject product was adulterated within the meaning of the
26 Federal Food, Drug and Cosmetic Act, and similar California statutes,
27 because it contained a deleterious substance that rendered it injurious
28 to health, i.e., *E. coli* O157:H7 bacteria.

51. The Defendants' various acts and omissions of negligence proximately caused A.K.'s *E. coli* O157:H7 infection and related illness, injuries, and damages.

(Breach of Express and Implied Warranties)

Page 15 of 17

1 Complaint, by this reference, as if each of these paragraphs were set
2 forth here in its entirety.

3 53. By offering I.M. Healthy SoyNut Butter products for sale to the
4 public, Defendants impliedly warranted that such products were safe to
5 eat, that they were not adulterated with a deadly pathogen, and that
6 the products had been safely prepared under sanitary conditions.

7 54. The Defendants breached these implied warranties by distributing
8 and selling the subject product, because it was contaminated by *E. coli*
9 O157:H7.

10 55. Further, the label of I.M. Healthy SoyNut Butter promises that
11 consumers will be "Healthy" if they purchase and consume the soy nut
12 butter.

13 56. By assuring the Plaintiffs that the I.M. Healthy soy nut butter
14 was healthy and that it was a "natural product," Defendants expressly
15 warranted that the food that they sold, distributed and supplied was
16 fit for the Plaintiffs' consumption.

17 57. Defendants breached their express warranty as described above in
18 that the food that they sold, distributed and supplied was not fit for
19 Plaintiffs' consumption.

20 58. The Plaintiffs' injuries proximately and directly resulted from
21 the Defendants' breach of express and implied warranties, and the
22 Plaintiffs are thus entitled to recover for all actual, consequential,
23 and incidental damages that flow directly and in a foreseeable fashion
24 from these breaches.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, the Plaintiffs pray as follows:

27 (1) That the Court award the Plaintiffs judgment against Defendants
28 for damages.

1 (2) That the Court award all such other sums as shall be determined
2 to fully and fairly compensate the Plaintiffs for all general, special,
3 incidental, and consequential damages incurred, or to be incurred, by the
4 Plaintiffs as the direct and proximate result of the acts and omissions of
5 the Defendants;

6 3) That the Court award the Plaintiffs their costs, disbursements,
7 and reasonable attorneys' fees incurred;

8 4) That the Court award the Plaintiffs the opportunity to
9 amend or modify the provisions of this Complaint as necessary or appropriate
10 after additional or further discovery is completed in this matter, and after
11 all appropriate parties have been served; and

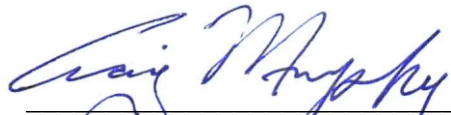
12 (5) That the Court award such other and further relief as it deems
13 necessary and proper in the circumstances.

14 **JURY TRIAL DEMAND**

15 The Plaintiffs demand trial by jury on all issues raised herein.

16 DATED June 13, 2019.

17 MURPHY & MURPHY LAW OFFICES

18 

19 _____
20 Craig Murphy, Esq.
21 California Bar No. 314526
22 4482 Market Street, Ste 407
23 Ventura, CA 93003
24 (805) 330-3393 Phone
25 (702) 369-9630 Fax
26 Attorney for Plaintiff
27
28

Murphy & Murphy Law Offices
4482 Market Street, Ste 407
Ventura, California 93003
Telephone (805) 330-3393
Facsimile (702) 369-9630